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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

KEVIN L. MURPHY,

Plaintiff and Appellant,

v.

CITIGROUP GLOBAL MARKETS, INC.,

Defendant and Respondent.

F058141

(Super. Ct. No. 08C0408)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Kevin L. Murphy, in pro. per., for Plaintiff and Appellant.

Keesal, Young & Logan, Peter R. Boutin and Nathan R. Jaskowiak for Defendant and Respondent.

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Plaintiff Kevin L. Murphy appeals from a judgment entered after the trial court sustained a demurrer to plaintiff's complaint without leave to amend. The complaint alleged that defendant Citigroup Global Markets, Inc. (sued as Smith Barney Citigroup) unlawfully discriminated against plaintiff by refusing to provide investment or financial services merely because of plaintiff's status as a prison inmate. Because we conclude the factual allegations do not reflect an arbitrary refusal to provide services, and no other potential basis for a cause of action was alleged, we affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

On October 22, 2008, plaintiff filed his original complaint against defendant Smith Barney Citigroup (now known as Citigroup Global Markets, Inc.) alleging several causes of action, including "UNFAIR BUSINESS PRACTICES" and "DISCRIMINATION AND REFUSAL TO DEAL." The complaint alleged that in June of 2008, plaintiff wrote a letter (or letters) to defendant's San Luis Obispo office to request an application and information about defendant's financial and investment products. In July of 2008, an agent or employee of defendant, later identified as Phillip Cobl, contacted prison staff where plaintiff was incarcerated "to tell them to let [plaintiff] know that [the San Luis Obispo address was] *a residence* and that [defendant was] not operating as a business from that address and that [plaintiff] should contact the Santa Barbara office if he wanted assistance." (Italics added.) Plaintiff alleged that this communication was "not forthright" because there was a "Yellow Pages" advertisement indicating that defendant was doing business in San Luis Obispo from that address, and that the real motivation for refusing to do business with him from the San Luis Obispo site was discrimination based on the fact that plaintiff was incarcerated.

Defendant filed a general demurrer to the complaint, which was sustained by the trial court on February 25, 2009, with leave to amend. One of the trial court's reasons for sustaining the demurrer was that the complaint did not adequately allege that defendant refused to do business with plaintiff.

Plaintiff's amended complaint was filed on March 11, 2009. The amended complaint against defendant alleged three causes of action: (1) unfair business practices, (2) violation of the Unruh Civil Rights Act (Civ. Code, § 51; hereafter Unruh Act or the Act), and (3) intentional tort. The amended complaint contained most of the same factual allegations as the original complaint, except that it characterized defendant's communication to the prison staff as follows: "In July of 2008[,] Phillip Cobl ... of [defendant] contacted correctional staff and told them to advise [plaintiff] that [Cobl] did not want to do business with [plaintiff] and that [Cobl] did not want [plaintiff] to contact any [of defendant's offices] related with him, which included the office ... in San Luis Obispo ... and the office located at 100 North Westlake Blvd ..., Westlake [Village, California]." Allegedly, the only reason that defendant did not do business with him from the San Luis Obispo office was that plaintiff was incarcerated.

On March 24, 2009, defendant filed its demurrer to the amended complaint. The demurrer alleged that plaintiff failed to state a cause of action because, pursuant to the allegations of the original complaint, defendant did not refuse service but merely directed plaintiff to obtain assistance from the Santa Barbara office, and because an incarcerated felon is not a member of a protected class under the Unruh Act. On May 27, 2009, the trial court sustained the demurrer to the amended complaint without leave to amend. Judgment was entered in defendant's favor on July 20, 2009. Plaintiff appealed from the judgment on the ground that the amended complaint adequately stated a cause of action.

DISCUSSION

I. Standard of Review

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its

parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

II. The Trial Court Correctly Sustained the General Demurrer

A. Unruh Act

Plaintiff claims that his amended complaint, which alleged defendant refused to do business with him based on the fact that plaintiff is incarcerated, stated a cause of action for violation of the Unruh Act. We begin with a summary of the law.

The Unruh Act is set forth at Civil Code section 51 and provides, in relevant part, as follows: “All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” (Civ. Code, § 51, subd. (b).) Although the Unruh Act expressly lists the categories of discrimination that are prohibited, the California Supreme Court has construed the statutory list as illustrative rather than restrictive. (*Harris v. Capitol Growth Investors XIV* (1991) 52 Cal.3d 1142, 1152, 1154-1156 (*Harris*) [prior cases summarized].) Thus, the Unruh Act has been applied to several classifications not expressed in the statute where the discrimination was deemed to be arbitrary. (See, e.g., *In re Cox* (1970 3 Cal.3d 205, 217-218 [unconventional dress or physical appearance]; *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 736-741 [families with children]; *O’Conner v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 793 [persons under 18]; *Rolon v. Kulwitzky* (1984) 153 Cal.App.3d 289, 292 [homosexuality].)

In *Harris*, where a landlord required prospective tenants to have a minimum level of monthly income (i.e., three times the monthly rent charged), the issue was whether the Unruh Act extended to discrimination based on economic or financial status. In considering that issue, the Supreme Court reexamined the validity of the earlier decisions that treated the statutory classifications as illustrative rather than restrictive. Although it did not overrule those decisions, it cautioned against extending the reach of the Unruh Act beyond the intended scope of the legislation. (*Harris, supra*, 52 Cal.3d at pp. 1159-1161.) *Harris* emphasized the primary importance of the categories set forth in the language of the statute, and found that the common element involved in each enumerated category was a *personal* characteristic—i.e., a person’s geographical origin, physical attributes, or personal beliefs. (*Id.* at pp. 1160-1161.) “When courts have applied the Act to arbitrary discrimination beyond the listed categories of race, sex, religion, etc., personal characteristics and not financial status or capability provided the basis of decision.” (*Id.* at p. 1161.) *Harris* concluded that the Legislature intended to limit the scope of the Act to the types of discrimination that are based on *personal characteristics*, not financial status. (*Id.* at pp. 1161-1162.)

In addition to considering the language of the Unruh Act, the *Harris* court also considered two other factors in holding that the Unruh Act did not extend to financial status. The first of these additional factors was the existence of legitimate business interests that would justify the discrimination. “While emphasizing personal characteristics in finding arbitrary discrimination, the California appellate cases have also recognized that legitimate business interests may justify limitations on consumer access to public accommodations.” (*Harris, supra*, 52 Cal.3d at p. 1162.) Applying that factor, the Supreme Court observed that landlords clearly have a legitimate and direct economic interest in the income level of prospective tenants, as would other businesses relying on a customer’s ability to pay over time. (*Id.* at pp. 1162-1163.) The final factor considered by the *Harris* court was the consequences of allowing claims for economic discrimination. (*Id.* at pp. 1165-1169.) In this regard, the Supreme Court noted two adverse consequences that would follow from adoption of the plaintiffs’ proposed

interpretation of the Act: (1) it would involve the courts “in a multitude of microeconomic decisions we are ill equipped to make” (*id.* at p. 1166), and (2) by forbidding a neutral, objective measure of ability to pay (i.e., a minimum income level), it would encourage use of subjective criteria that might increase the types of discrimination expressly prohibited under the Act (*id.* at pp. 1168-1169).

Subsequent cases addressing the question of whether a category not enumerated in the Unruh Act is protected against arbitrary discrimination have applied the three-part analysis utilized in *Harris*, which consists of analyzing (1) the language of the statute, (2) the legitimate business interests of the defendant, and (3) the consequences of allowing the new discrimination claim. (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 933; *Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, 836; *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 768.) Where the basis for discrimination is legitimate or nonarbitrary on its face, courts have not hesitated to decide such questions on demurrer. (*Harris, supra*, 52 Cal.3d at p. 1165 [digesting Unruh Act cases resolved on demurrer or nonsuit]; *Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 95-96 [refusal to deal with real estate speculator upheld on demurrer].)

With these principles in mind, we now turn to the question of whether plaintiff adequately stated a cause of action under the Unruh Act. Plaintiff’s amended complaint alleged that defendant refused to provide financial or investment services to him solely because of plaintiff’s incarceration and that such refusal constituted a violation of the Unruh Act. Defendant responds that plaintiff failed to state a cause of action under the Unruh Act because the *original* complaint reflected that plaintiff was not refused service, but was merely directed to seek assistance from another office; and, in any event, the protections of the Unruh Act do not extend to the category of incarcerated felons.

For reasons discussed below, we conclude on fairly narrow grounds that plaintiff failed to state an Unruh Act cause of action in the present case. In so concluding, we find it unnecessary to resolve the broader question of whether, or to what extent, the Unruh Act protects against arbitrary discrimination based on incarceration. Even if the Unruh

Act potentially applies to prevent arbitrary discrimination against prison inmates, there was no violation in the present case as we shall shortly explain. However, before we get to that conclusion, we must first address the preliminary issue of what to do about material allegations that were omitted from the amended complaint.

Defendant points out that the amended complaint omitted certain material facts that were set forth in the original complaint. According to defendant, these omitted facts established there was no refusal to provide services, but only an instruction to seek assistance at a different office. Whether or not the omitted facts showed there was “no refusal to deal,” we agree that they are pertinent to the demurrer and are properly considered in deciding whether plaintiff stated a cause of action. We now elaborate.

“It is ... well established that, when reviewing a judgment entered following the sustaining of a demurrer without leave to amend, the appellate court must assume the truth of the factual allegations of the complaint. [Citation.] However, an exception exists where a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings. [Citations.] In these circumstances, the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint. [Citations.]” (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383-384; see also *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946; *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 653.)

Here, plaintiff’s original complaint alleged that defendant advised him, through prison staff, that the San Luis Obispo address was a residence and that plaintiff should contact defendant’s Santa Barbara office in order to obtain assistance. The amended complaint omitted these facts and alleged instead that defendant’s communication to prison staff was *actually* that defendant did not want to do business with plaintiff and requested that he not send anything further to its address. Under the authorities set forth

above, the omitted allegations will be read into the amended complaint unless an adequate explanation is presented by plaintiff.

Plaintiff offers an explanation for omitting the prior allegations. He claims that his investigation revealed that he was mistaken about the nature of the communication made by defendant to prison staff. In particular, plaintiff refers to a memorandum by a correctional officer reflecting that Mr. Cobl requested that plaintiff not contact him at the San Luis Obispo address, which was Mr. Cobl's residence where he worked for defendant and received work-related mail, or at a second address in Westlake Village, California, from which Mr. Cobl apparently had worked for defendant and received mail.¹ The correctional officer's memo also reported Mr. Cobl communicated that "the closest office is in Santa Barbara," thereby giving plaintiff information of an alternative office for assistance. A glaring defect in plaintiff's proffered excuse for omitting the prior allegations is that the memorandum prepared by the correctional officer is in accord with much of what was previously alleged. That is, the memorandum confirms that (1) Mr. Cobl was working out of his residence in San Luis Obispo, and (2) an alternative office in Santa Barbara was suggested. We therefore read such omitted matters into the amended complaint.

Under such facts, we conclude for two basic reasons that plaintiff failed to state a cause of action for violation of the Unruh Act. First, the allegations simply do not reflect a denial by defendant of equal services or accommodations. Plaintiff's letter made an inquiry to one address about financial and investment services or products and sought assistance with obtaining such services or products. In response, by communication that came through prison staff, plaintiff was directed to another office address for such assistance. He was told, in effect, the inquiry should not be made to *this* address, where Mr. Cobl was merely doing business out of his residence, but to another office in Santa

¹ We note defendant admitted in discovery responses that Mr. Cobl had authorization to work out of his home in San Luis Obispo, and that he would sometimes receive business-related mail there from the Westlake Village office.

Barbara. Notwithstanding the bare conclusions of wrongdoing set forth in plaintiff's amended complaint, we fail to see how these actions showed a violation of the Act.²

Second, even assuming the truth of the allegation that Mr. Cobl's conduct was premised on plaintiff's status as a prison inmate, in the present context we would conclude that such conduct was reasonable (not arbitrary) on its face. One of the things stressed by Mr. Cobl's communication was that the San Luis Obispo address was his residence. We believe it is self-evident that when a person who does business out of his or her home receives a letter or other communication from a prison inmate inquiring about the provision of products or services, the person would have a reasonable basis for concern or caution about the prospect of undertaking *from his or her home* a business relationship with someone who is an incarcerated criminal.³ Such concern or caution constitutes an interest that is not arbitrary and does not arise out of any of the enumerated personal characteristics as to which the Unruh Act expressly forbids discrimination.⁴ This appears to be the gist of what Mr. Cobl communicated to the prison staff—i.e., that

² Defendant also argues that plaintiff is seizing upon mere de minimus or hyper-technical shortfalls so he can file a nuisance lawsuit. In this regard, defendant points out that while plaintiff says he was genuinely seeking investment services from defendant, he recently obtained a waiver of filing fees on appeal due to inability to pay. Defendant also notes that plaintiff has filed numerous lawsuits from prison against financial institutions and public entities during the past decade. We decline to speculate as to plaintiff's motives, and shall confine our analysis to the question of whether plaintiff has stated a cause of action.

³ Obviously, an incarcerated individual is in that situation because he or she was convicted of committing one or more felonious criminal offenses, and it may be presumed that a purpose of his or her incarceration is public safety or the protection of the public from that incarcerated individual. Thus, whether we identify the concern of the person doing business out of his or her home as one of safety, peace of mind or protecting the sanctity of one's home address from dealings or associations with imprisoned criminals, it is not unreasonable.

⁴ Although we do not decide the issue of whether the Unruh Act applies to discrimination based on incarceration, we have serious doubts that a person's situation as a prison inmate is a personal characteristic of the same type as those enumerated in the Act.

he worked out of his home, that plaintiff should not write to that address,⁵ but that defendant had an alternative office in Santa Barbara from which plaintiff could seek assistance. Under the circumstances, we conclude that no *arbitrary* discrimination has been alleged by plaintiff as a matter of law. Therefore, even if the Unruh Act may be construed to prohibit a business from arbitrary discrimination based on a person's status as a prison inmate (an issue we decline to resolve),⁶ no such facts were alleged in this case. The trial court properly sustained the general demurrer to the Unruh Act cause of action.

B. Unfair Business Practices

Plaintiff's cause of action labeled as "UNFAIR BUSINESS PRACTICES" is presumably based on Business and Professions Code section 17200 (section 17200). Section 17200 defines unfair competition as any "unlawful, unfair or fraudulent business act or practice." The "unlawful" business activity proscribed by section 17200 includes anything that can properly be called a business practice and that at the same time is forbidden by law. (*State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1103.) In other words, section 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) Here, the only specific violation of law that was alleged in plaintiff's amended complaint was the claim of unlawful discrimination in violation of the Unruh Act. However, as discussed above, plaintiff failed to state an Unruh Act cause of action.⁷

⁵ The same analysis applies to mail sent to Mr. Cobl at the Westlake Village office address, which would apparently be forwarded to Mr. Cobl at his residence.

⁶ We are aware that in a prior unpublished case, another panel of this court concluded the Unruh Act would apply to discrimination based on one's status as a prison inmate, absent a legitimate business interest on the part of the defendant.

⁷ Although plaintiff's appellate brief lists other statutes that he now claims may have been violated, these were never alleged. Moreover, with respect to such other

Plaintiff also contends that defendant's practices, as set forth in the amended complaint, were *fraudulent*. A business practice is deemed fraudulent under section 17200 if it is shown that members of the public are likely to be deceived by that practice. (*Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 1274-1275.) Plaintiff's amended complaint did not expressly allege this theory, nor did it allege any factual basis that would reasonably support his contention that members of the public would likely be deceived by defendant's conduct. Plaintiff appears to rely on the "Yellow Pages" advertisement that stated defendant had a place of business at a certain address in San Luis Obispo, which was the address to which plaintiff sent his letter. There is no dispute that Mr. Cobl was conducting business for defendant at that address. We are unable to discern from plaintiff's amended complaint, or his appeal, how that advertisement could likely cause consumers to be deceived in any material respect. We conclude that plaintiff failed to state a cause of action based on "fraudulent" practices. (§ 17200.)

Finally, plaintiff contends that defendant's practices were "unfair" under section 17200. In consumer cases, "“an ‘unfair’ business practice occurs when that practice ‘offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.’”” (*Bardin v. DaimlerChrysler Corp.*, *supra*, 136 Cal.App.4th at p. 1268, quoting *Smith v. State Farm Mutual Automobile Ins. Co. v. Superior Court* (2001) 93 Cal.App.4th 700, 718-719.) Nothing in plaintiff's amended complaint comes close to meeting this definition of unfair conduct.

purported violations of law, plaintiff's appeal failed to provide any substantive legal argument or analysis explaining how defendant's conduct alleged in the amended complaint violated the elements of any particular statute or statutes. We disregard such unsupported contentions raised only in a perfunctory manner. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [a point perfunctorily raised, without analysis or authority, is passed as waived]; *Stevenson v. Baum* (1998) 65 Cal.App.4th 159, 167, fn. 8 [a point raised in passing, without adequate legal argument developing the point, is deemed waived].)

We conclude the trial court properly sustained the general demurrer to the unfair business practices cause of action.

C. Intentional Tort

The third cause of action of plaintiff's amended complaint was labeled, "INTENTIONAL TORT." In this portion of the amended complaint, plaintiff essentially realleged the previous allegations and concluded that these constituted an intentional tort. We find the allegations are devoid of facts constituting any tort cause of action. The general demurrer was rightly sustained.

II. Leave to Amend Was Appropriately Denied

Plaintiff was given two opportunities to state a cause of action in the trial court, and failed both times. Moreover, plaintiff has failed to meet his burden of presenting a basis for curing the defects to his pleading. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) We conclude that the trial court properly sustained the demurrer to the entire complaint without leave to amend.

DISPOSITION

The judgment is affirmed, with each party to bear his (or its) costs on appeal.

Kane, J.

WE CONCUR:

Wiseman, Acting P.J.

Hill, J.